SOLVING THE PROBLEM-SOLVER PROBLEM: HOW A REVAMP OF ARBITRAL ETHICS WILL ENCOURAGE PLAINTIFFS AND BENEFIT DEFENDANTS

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I. INTRODUCTION

Let us begin with an exercise: imagine for a moment that you are a layperson, not yet a plaintiff, ambling about your life with no legal experience and, as of yet, no legal problems against which you must defend. Suppose you have been unemployed and looking for a job for several months, and you finally land a job as a claims adjuster at a national insurance company. Included in your employment contract is a non-negotiable arbitration agreement stating that you will take all conflicts that arise out of your employment to binding arbitration not subject to judicial review. This includes regular work disputes, such as disputes over wages and hours, and also disputes related to things outside of your contract, like instances of sexual, racial, or religious discrimination. If you do not want to be bound by the contract, you have to turn down this job, which, with mounting bills, a shrinking savings account, and no alternative income, you are in no position to do. Included in the arbitration provision in your contract are various terms favoring your employer—many of which seem at best innocuous and at worst unintelligible—and one that you may not know the gravity of until you are facing it: your employer gets to choose the arbitrator that will preside over your dispute.

You may think that the provision seems harmless enough. After all, arbitration will be less expensive should a problem arise that interferes with or terminates employment. It will be expedient and, at least ideally, fair. While it is an obvious suspicion that your employer may have some kind of relationship with the arbitrator selected or the company serving as the arbitration provider, this by

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itself may be a risk that some may be willing to take. However, you will not have access to information about the amount of times the selected arbitrator has arbitrated over disputes for your employer, who may employ people across all 50 states. You will not have access to that arbitrator's decisions in other employment disputes. Since the details of those disputes are typically subject to a protective order, you can have no leverage of your own and no knowledge of what to ask for. Your contract likely forbids you from raising your problems on behalf of a class of people who have experienced the same harms you have. You will not know what portion of this arbitrator's income is derived from a positive working relationship with your employer. All of these invisible factors will be just as important as the facts of your case when it comes to the outcome of your dispute, and you will not even know that your case started against you, perhaps even years before you became a part of it.

Notwithstanding the problems petitioners face when bound by arbitration provisions in contracts, the American judicial system is relying more than ever on alternative dispute resolution methods like arbitration to solve legal disputes. Given the expedient, private, and cost-effective nature of arbitration, which facilitates dispute resolutions that are subject to limited review and not bound by such confines as the evidence or procedural rules of the courts, it should come as no surprise that arbitration is on the rise nationally and internationally.[1] Data collected from some of the world's top arbitration institutions show that from 2014 to 2015, newly initiated arbitral proceedings increased by nearly ten percent.[2] Arbitration clause provisions are on the rise across several industries—notably, credit card contracts and mobile wireless provider services.[3]

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1 *See* Lindsay Melworm, *Biased? Prove it: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO J. INT'L & COMP. L. 431, 433 (2014).

2 *See* Dr. Markus Altenkirch & Dr. Jan Frohloff, *Global Arbitration Cases Still Rise—Arbitral Institutions' Caseload Statistics for 2015*, GLOBAL ARB. NEWS (Aug. 25, 2016), https://globalarbitrationnews.com/global-arbitration-cases-still-rise-arbitral-institutions-caseload-statistics-2015/ ("The eleven institutions selected for this article registered 5,207 new arbitration cases in 2015 compared to 4,737 cases in 2014. That is an increase in 470 cases or 9.9%.").

3 CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (Mar. 2015) [hereinafter ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf ("Examining the 357 [credit card contract] issuers that have agreements in the Bureau's database for the entire period from 2010 through 2013, the number of issuers using arbitration clauses increased from 53 as of year-end 2010, to 54 as of year-end 2011, to 55 as of year-end 2012, to 58 as of year-end 2013.").

Though corporations pay for arbitration services, an individual arbitrator's potential for "buying" repeated business from the same companies by turning out favorable decisions is one problem in the arbitral system. This problem and others will be expounded in a discussion of relevant cases in the Background section below.

To illustrate this problem, some point to the codes of ethics by which independent and commercial arbitrators are meant to abide. A helpful example is the Code of Ethics for Arbitrators written by the American Arbitration Association, the leading United States arbitration institution with a parent company that is the leading international arbitration institution in the world.[4] The AAA Code of Ethics for Arbitrators, constructed with the help of a special ethics committee from the American Bar Association,[5] lacks some provisions commonly found in other industry-wide ethics codes. Some common features of other codes of ethics that are absent from the AAA Code of Ethics are (a) the lack of punishment for acting unethically and (b) the fact that arbitrators are not required to swear that they will uphold the code of ethics.[6] Additionally, critics of the arbitral ethics scheme point out that there are not very stringent qualifications required for becoming an arbitrator. The AAA, for example, lists qualifications on its website; however, those qualifications are not "mandatory" in the sense that they need not all be met, and they do not work to prevent possible conflicts of interest that may arise between arbitrators and corporations.[7] Used correctly, ethics codes not only increase the likelihood that people will behave in certain ways, they also "can focus public servants on actions that result in doing the right things for the right reasons."[8]

The problems discussed above—namely, the inability of plaintiffs to know or bargain for better arbitration provisions; the ability of companies to repeatedly pick arbitrators with whom they have worked in the past; a Code of Ethics that fails to definitively bind arbitrators to ethical rules or punish arbitrators for violating its

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4 *Id.*

5 *The AAA's Code of Ethics for Arbitrators in Commercial Disputes*, 'LECTRIC L. LIBRARY, https://www.lectlaw.com/files/adr12.htm (last visited Oct. 22, 2017).

6 *Id.*

7 *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, A.B.A., https://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf (last visited Apr. 25, 2019).

8 Stuart C. Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons* 8, OECD.ORG (Winter 2005), https://www.oecd.org/mena/governance/35521418.pdf.

clauses; and compulsory arbitration and class action waivers—all combine to create a dispute resolution environment that is toxic for plaintiffs throughout every stage of the dispute.

This Note aims to expose the consequences of these ethical deficiencies, including a lack of uniformity in arbitral results, conflicts of interest, and a lack of bargaining power for plaintiffs. This Note will also provide a framework for what an arbitral code of ethics should look like to ensure greater protections for petitioners. It is important to mention that this Note will explore the problems introduced above exclusively in the context of the ethical framework provided by the AAA. Part II will provide background information on the rise of arbitration, the development of the AAA Code of Ethics, and the issues petitioners in arbitral proceedings typically face in actions including employment disputes, credit card disputes and other types of class actions. Part III discusses the reasons that the AAA Code of Ethics fails to do its part to protect all parties to a dispute, and it explores the consequences faced by petitioners due specifically to these ethical breakdowns. Part IV suggests possible changes to address these systemic problems. One potential solution offered is for key players on both sides of the arbitral system to sit down and discuss, via negotiation, how to make the system fairer for all parties involved while retaining the financial feasibility and privacy that attracts parties to arbitration. The framework upon which the negotiations would be based is FINRA, which has created a system that works hard to limit the instances of conflicts of interest in proceedings such as these. Section V recognizes the problems that would remain; this is to call attention to the fact that the American alternative dispute resolution system will not be fixed with any one isolated action.

II. BACKGROUND: HOLES IN THE ARBITRAL ETHICS SYSTEM

A. *Arbitration on the Rise, Protective Provisions on the Decline*

The cost of arbitration and its quicker pace are two of its most attractive qualities.[9] However, market conditions are not the only factor driving the rise in alternative dispute resolution. The U.S. Supreme Court, in an effort to desaturate dockets and decrease

[9] Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 70–71 (1986).

heavy dependency on the judicial system,[10] has issued a number of decisions making it more favorable for businesses to depend on binding arbitration clauses to handle consumer disputes, discrimination allegations, and consumer claims.[11] One recent major decision contributing to the rise of arbitration was *AT&T Mobility LLC v. Concepcion*,[12] in which the Court, in a split opinion, held that the Federal Arbitration Act of 1925 ("FAA")[13] rendered ineffectual any state law that would have disallowed a "no-class" provision in a consumer arbitration clause.

That principle was taken one step further in *DirecTV, Inc. v. Imburgia*,[14] in which the Supreme Court held that consumer arbitration clauses would be honored even when a state court finds that there is good reason to void them. The Court, in a 6-3 opinion, held that the FAA preempts a state court's review of class action waivers in arbitration provisions of consumer contracts.[15] Justice Ginsburg's dissent, joined by Justice Sotomayor, criticized the majority for "again expand[ing] the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts."[16]

The Court even further expanded the breadth of arbitration clauses.[17] In January 2017, it granted certiorari to three cases from three different circuits which asked whether employee arbitration clauses—those that prohibit employees from bringing class actions joined by their coworkers against their employers—are enforceable nationwide.[18] The cases were consolidated into *Epic Systems Corp. v. Lewis*,[19] for which oral arguments were heard on Oct. 2, 2017.[20] The question preserved for certiorari was, "does the Na-

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10 Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. Disp. Resol. 115, 124.

11 *See, e.g.*, Am. Express Co., et al. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that a prohibitively high cost of arbitration is not a sufficient reason for a court to overrule an arbitration clause that forbids class action suits).

12 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

13 9 U.S.C. §§ 9–10.

14 DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

15 *Id.*

16 *Id.* at 478 (Ginsburg, J., dissenting).

17 Spencer Stephens, *Tragedy of the Commonality: A Substantive Right to Collective Action in Employment Disputes*, 67 Emory L.J. 157, 187 (2017).

18 Robert Iafolla, *Supreme Court to Decide If Employee Arbitration Clauses are Enforceable Nationwide*, Insurance J. (Jan. 17, 2017), https://www.insurancejournal.com/news/national/2017/01/17/438923.htm.

19 Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017) (granting certiorari).

20 Andrew J. Fabianczyk, *Lewis v. Epic: An Employee Arbitration Odyssey*, 2017 Wis. L. Rev. 803, 808 (2017).

tional Labor Relations Act prohibit enforcement of an agreement requiring employees to resolve disputes with the employer through individual arbitration under the [FAA]?"[21] Justice Gorsuch, writing for a five-Justice majority, held that the NLRA does not supersede Congress' instructions in the FAA that arbitration agreements prohibiting class action claims must be honored.[22]

These cases have created a national conversation about the scope of alternative dispute resolution in America and what affect this broadened system could have on our legal system.[23] While its effects are not yet clear, some scholars and observers point out that the *Epic Systems* decision has the potential to prolong and exacerbate some preexisting problems within the arbitration framework, specifically in the area of employment disputes.[24] Justice Ginsburg, in her dissent in *DirecTV*, lamented one of these problems: that with the selectivity and power granted to corporations via arbitration provisions, the rich get richer and the poor get paid to stay quiet.[25] On the other hand, proponents of the pro-business *Epic Systems* decision—which was highly anticipated, given the new makeup of the Court[26] and Justice Gorsuch's reputation for taking a laissez-faire approach to business regulations and consumer protection[27]—say that class action waivers are beneficial because "if arbitration agreements' class action waivers are not enforceable,

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21 *Epic Systems Corp. v. Lewis*, OYEZ, https://www.oyez.org/cases/2017/16-285 (last visited Oct. 21, 2017).

22 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

23 Fabianczyk, *supra* note 20, at 829.

24 *See generally* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 OHIO ST. J. ON DISP. RESOL. 1 (2017).

25 DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015):

> Today's decision steps beyond *Concepcion* and *Italian Colors*. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts. . . . Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.

26 Jeff John Roberts, *What Supreme Court Nominee Neil Gorsuch Will Mean for U.S. Business*, FORTUNE (Feb. 1, 2017), http://fortune.com/2017/02/01/supreme-court-neil-gorsuch-business/ (observing that the status quo regarding employment rights and unions was maintained after Justice Scalia's sudden death and that Justice Gorsuch's arrival on the Court signifies the end of that 4-4 gridlock).

27 Amanda Ballantyne, *Judge Gorsuch favors corporate goliaths over small businesses*, THE HILL (Apr. 9, 2017, 10:20 AM), https://thehill.com/blogs/pundits-blog/economy-budget/328000-judge-gorsuch-favors-goliath-corporations-over-mom-and-pop.

arbitration will become more costly, even though affordability is one of the main purposes for arbitration."[28]

Given the Court's enthusiastic support for the expansion of arbitration, some consumers and employees have taken the fight against mandatory arbitration clauses to the court of public opinion. Notably, in the spring of 2018, as one of the country's major law firms was finalizing the hiring for its summer associate class, one employee noticed that the new employment contract featured a provision requiring all associates to settle their disputes in binding arbitration, with the firm as the party designated to select the arbitrator.[29] After a social media attack on the firm's practice, it rescinded that provision and allowed disputes to be handled in courts.[30] While this shows that consumers retain some power, the lack of across-the-board protections for consumers who are not highly trained in the law remains an issue that needs addressing.

B. *Evolution of AAA Code of Ethics and Qualifications*

The Code of Ethics used by the American Arbitration Association was created in 1977 "by a joint committee consisting of a special committee of The American Arbitration Association and a special committee of the American Bar Association."[31] The goal of the code of ethics was to provide ethical guidelines for cases sent to arbitration and alternative dispute resolution.[32] The preamble to the code explicitly states that while its mission is to provide uniform ethical guidelines, the rules themselves are not the AAA's rules and do not apply to mediation or conciliation.[33]

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28 Allen Smith, *NLRB Tells Supreme Court it Opposes Class-Action Waivers*, SOC'Y FOR HUMAN RES. MGMT. (Aug. 18, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlrb-opposes-class-action-waivers.aspx).

29 Debra Cassens Weiss, *After social media outcry, Munger Tolles will no longer require mandatory arbitration*, ABA J. (Mar. 26, 2018, 10:00 AM), http://www.abajournal.com/news/article/after_social_media_outcry_muner_tolles_will_no_longer_require_mandatory_arb/?utm_source=Maestro&utm_medium=email&utm_campaign=daily_email.

30 Meghan Tribe, *Munger Tolles Backtracks on Summer Associate Arbitration*, AM. LAW. (Mar. 25, 2018, 10:27 PM), https://www.law.com/americanlawyer/2018/03/25/munger-tolles-backtracks-on-summer-associate-arbitration/?slreturn=20190012170732.

31 *The AAA's Code of Ethics for Arbitrators in Commercial Disputes*, *supra* note 5.

32 *Id.*

33 *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARBITRATION ASS'N (Mar. 1, 2004) [hereinafter *Code of Ethics*], https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

The AAA Code of Ethics is, in several ways, similar to many professional codes of ethics, in that it condemns conflicts of interest, encourages ethical behavior in decision-making, includes qualifications for the job, and suggests courses of action when problems arise. However, it lacks some key provisions that some other professional codes of ethics hold to be central components of that industry's ethical practices.[34] Among the two most glaring missing portions from the AAA's Code of Ethics are: (1) arbitrators are not sworn to follow the code, and (2) there are no formal disciplinary measures (or, at least, no *published* formal disciplinary measures) for violations of the code. These two components in codes of ethics in other professional industries greatly influence the choices of professionals and impact professionalism and uniformity of behavior in different professions;[35] their absence in the arbitral code of ethics leaves some wondering what rules arbitrators consider themselves bound to.[36]

C. *Arbitration as a Volume Business: Repeat Players and Conflicts of Interest*

Arbitration, for many arbitrators, is a volume business.[37] Since "arbitrators are compensated by the parties to a particular dispute each time they preside over an arbitration,"[38] arbitrators often fall into the trap of becoming, or working for, "repeat players," servicing one company or one party in a dispute several times.[39] "Arbitrating is something they do professionally, as part of their practice (if an attorney) or as their sole practice."[40] Some scholars argue that when arbitration is one's primary profession, when faced with disputes involving a one-time plaintiff and a company with whom the arbitrator deals frequently, the choice be-

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[34] Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 109 (2011).

[35] Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 426–40 (2005).

[36] Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight*, 87 IOWA L. REV. 1337 (2002).

[37] Bradley Dillon-Coffmann, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1110 (2010).

[38] Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 42 (2007).

[39] *Id.*

[40] *Id.*

comes less about a fair outcome and more about who is padding the arbitrator's pocket.[41] The problem of repeat players, some observe, is heightened in employment arbitration;[42] however, because these problems are very difficult to track and quantify, our ability to regulate and reduce them suffers greatly.[43] Scholars and observers on the opposing side of the argument argue that the system of arbitration is being improperly attacked by advocates who want more protections for plaintiffs than is reasonable or fair in a system that is designed to be cost- and time-effective.[44]

Arbitrators are generally expected to be (1) impartial and (2) independent, as their judicial counterparts aspire to be.[45] "In common usage, independence refers to the absence of improper connections, while impartiality addresses matters related to prejudgment."[46] An arbitrator might lose his or her independence from problematic or conflict-ridden relationships between the arbitrator and one of the parties. Often, these relationships result "from financial dealings (such as business transactions and investments), ties of a sentimental quality (including friendships and family), or links of group identification (for example, shared nationality and professional or social affiliations)."[47] Accordingly, arbitrators who hold even loose financial ties with one of the parties in a dispute may have their impartiality or independence in decision-making compromised.[48]

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41 *Id.* ("[The payment scheme] raises the troubling concern that there may be pecuniary incentive to be selected as an arbitrator as often as possible. The implication is that, as a repeat player, arbitrators who arbitrate consumer disputes are more likely to feel pressured to rule in favor of the party most likely to choose them again in the future.").

42 *See* Edward Silverman, *The Suspicious Existence of the 'Repeat Player Effect' in Mandatory Arbitration of Employment Disputes*, NAT'L L. REV. (Mar. 31, 2013), https://www.natlawreview.com/article/suspicious-existence-repeat-player-effect-mandatory-arbitration-employment-disputes.

43 *Id.*:

> The repeat player effect is real—*there*, I said it. The only reason why any confusion or uncertainty persists is because some individuals fail to consider the breadth of the problem—people say *effect* but what they mean is *bias*. The greater, empirically verifiable phenomenon of consistent employer advantage—the *real* repeat play effect—is swept up in a theory which, by definition, cannot be proven. Of course when the existence of a phenomenon is premised on proving the unprovable—or the *nonverifiable*—consensus cannot exist, because believing in the repeat player effect becomes something of an act of faith, or conviction.

44 Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21 (1997).

45 William W. Park, *Arbitrator Bias*, TRANSNATIONAL DISP. MGMT. 6 (2015).

46 *Id.*

47 *Id.*

48 *Id.*

Critics of the repeat-player problem further argue that requiring arbitrators to disclose the amount of times they have presided over cases involving a given party could reduce the adverse effect repeat players have on arbitration plaintiffs.[49] However, such a framework has not been put in place nationally.[50] California is one state that has mandated its arbitrators to disclose the amount of business they have gotten from parties to a dispute within the last two years.[51] When the arbitrator has presided over a dispute involving either party, he or she must disclose the details of that transaction.[52] If the arbitrator has been involved with one party more than five times in the two years prior to the dispute at hand, a written summary is required detailing the number of times the party prevailed.[53] Statutes such as California's were met with intense backlash from arbitrators and provider organizations,[54] and there is little to no empirical evidence about what effects they have had on plaintiff victories in arbitral proceedings in California.[55] Opponents of these statutes cite recordkeeping costs as the main reason to not implement such policies nationwide.[56] The AAA has not implemented any rules similar to those enacted in California.[57]

III. Discussion: What Current Codes of Ethics Lack and the Negative Impacts These Factors Have on the Arbitral System in the U.S.

A. *Ethical Failures*

1. Not Sworn and No Pre-arbitral Ethical Qualifications

One major flaw in the AAA's code of ethics is its lack of requirement that arbitrators be "sworn" to compliance with their code of ethics; or rather, that arbitrators are not licensed and, in

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49 Peter L. Murray, *The Privatization of Civil Justice*, 91 Judicature 272, 316 (2008).

50 *Id.*

51 Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 Ohio St. J. on Disp. Resol. 343, 350–51 (2003).

52 *Id.*

53 *Id.*

54 *Id.* at 359.

55 *Id.*

56 Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 Yale L.J. 2346, 2366 (2012).

57 Folberg, *supra* note 51, at 358.

turn, those licenses do not depend on compliance with the code.[58] While arbitrators are not acting as lawyers in their arbitral capacities, there is merit in exploring how arbitration's sister industry—the American legal system—regards and regulates ethical behavior.[59]

An important case involving a lawyer's obligation to comply with an ethical code is *Wieder v. Skala*.[60] In that case, an attorney considered himself to be bound by the ABA's Model Rules of Professional Responsibility and the New York Rules of Professional Conduct, forcing him to report his colleagues' misconduct.[61] The New York Court of Appeals held that the repercussions he faced—including termination of his at-will employment at the law firm where he worked—were improper because following the code of ethics was so intrinsic to doing his job *as an attorney and an agent of the legal profession* that not following it, while allowing him to remain employed, could have resulted in his disbarment.[62] The Court held that legal professionals should never be faced with the challenge of acting ethically on one hand and remaining employed in a legal setting on another;[63] the two interests are not competing and cannot be made to be competing by environmental or professional pressures to act unethically.[64]

No similar provision, like the one controlling in *Wieder* from the Model Rules of Professional Responsibility and New York State's equivalent, exists for AAA arbitrators that violate the AAA's code of ethics. Taking an oath to abide by the AAA's rules is not a prerequisite to serving as an arbitrator. While other qualities signifying moral fiber or a commitment to justice and fairness are "qualifications" to become an AAA arbitrator—including "Neutrality: freedom from bias and prejudice," and "Reputation: held in the highest regard by peers for integrity, fairness and good judgment"—nothing requires applicants to formally commit themselves to arbitral ethical standards.[65] Since arbitrators typically

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58 Abram H. Stockman, *III Now, Who Shall Arbitrate?*, 19 STAN. L. REV. 707, 717 (1967).

59 Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Model Standards of Conduct for Mediators*, 5 APPALACHIAN J. L. 195 (2006).

60 Wieder v. Skala, 80 N.Y.2d 628 (1992).

61 *Id.*

62 *Id.*

63 *Id.*

64 *See generally* Cathryn C. Dakin, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043 (1995).

65 *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, *supra* note 7.

work in the field over which they preside, their own decisions have direct impacts on their professional responsibilities and behavior. As such, it is clear that a flimsy condemnation of conflicts of interest from the Code of Ethics, with nothing more, can do little to eliminate or mitigate the problem of arbitrators acting in their own self-interest.[66]

2. No Discipline

Many codes of ethics in major professional industries include disciplinary measures for those who violate industry standards. There is a large and growing body of scholarship that supports the insertion of disciplinary measures in ethics directives because these measures increase employees' enthusiasm for ethical behavior and compliance.[67] Some of this scholarship favors the idea that the behavior of a company's leadership is the best predictor of that company's ethical compliance.[68] Others, however, recognize the value in top-down leadership but place heavier emphasis on including disciplinary measures in the codes themselves.[69] As top-down leadership tends to accomplish little if everyone is not subject to the same disciplinary measures (thereby eschewing a true rule of law framework in ethics-driven environments), mere exemplary leadership is not enough. Disciplinary measures are central to ethical behavior.[70]

The American Bar Association and the American Medical Association both have codes of professional responsibility and boards that oversee professionals within those industries.[71] Transgressors face a wide range of punishment, from penal fines to delicensing.[72] While the AA has been lauded for the qualities it does *not* share

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66 Richard Mittenthal, *Self-Interest: Arbitration's 'Unmentionable' Consideration?*, 49 DISP. RESOL. J. 70 (1994).

67 *See, e.g.*, Anna Assad, *How Does a Code of Ethics Impact Your Work Practices?*, HOUS. CHRON., Apr. 9, 2017.

68 Charles D. Kerns, *Creating and Sustaining an Ethical Workplace Culture*, 6 GRAZIADIO BUS. REV. (2003).

69 *See* Jacqueline Karen Kott, *The Role of Ethics in Employee Behavior: A Thesis* (May 2012) (published M.S. thesis, University of Tennessee at Chattanooga) (on file with UTC Scholar database, University of Tennessee at Chattanooga).

70 *Id.*

71 *See ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last updated Dec. 4, 2018); *see also AMA Code of Medical Ethics*, AM. MED. ASS'N, https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/principles-of-medical-ethics.pdf (last revised June 2001).

72 *See ABA Model Rules of Professional Conduct*, *supra* note 71; *AMA Code of Medical Ethics*, *supra* note 71.

with the ABA or AMA—notably, that its services are expedient and cost-efficient—many have begun to question whether the unregulated system of arbitration should adopt some of the qualities the ABA requires of its practitioners.[73]

Disciplinary measures are key components of enforcement for codes of ethics and ethical responsibility.[74] Typically, an effective code of ethics will also refer to a review board or ethics oversight committee that ensures compliance.[75] However, there is neither a disciplinary code nor an oversight committee mentioned in the AAA's Code of Ethics.[76]

B. *Negative Consequences*

1. Unequal Bargaining Power

As discussed above in the introductory hypothetical, one of the biggest problems with the AAA's ethical framework—other than its lack of enforcement and disciplinary procedures for the unethical arbitrator—is that arbitral decisions are hardly ever subject to review.[77] Arbitration is, by design, a procedure that avoids interactions with the judicial system.[78] However, the problem of repeat players leaves plaintiffs without adequate bargaining power to protect their interests.[79]

Petitioners also rarely have past comparable cases at their disposal when arbitrating what the other side will pay out. In employment disputes, for example, employees are often unable to find out the details and settlements of arbitration proceedings similar to their own due to the confidential nature of arbitration clauses in employment contracts.[80] This leaves plaintiffs without a method to establish a policy or practice of discriminatory behavior to support

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[73] Sabin, *supra* note 36, at 1367 ("[T]he weaknesses of arbitration are instructive in formulating a better system, or at least positive steps in that direction. . . . First, arbitrators must be accountable to a supervising body. Second, *this body must have power to discipline arbitrators for misconduct or violations of unified rules*") (emphasis added).

[74] *Top Ten Tips for Developing an Effective Code of Conduct*, Ass'n of Corp. Couns., Nov. 9, 2010.

[75] *Id.*

[76] *Code of Ethics*, *supra* note 33.

[77] Szalai, *supra* note 10.

[78] *Id.*

[79] Satz, *supra* note 38.

[80] Carrie Menkel-Meadow, *The Evolving Complexity of Dispute Resolution Ethics*, 30 Geo. J. Legal Ethics 389, 409 (2017).

their claims, and it also leaves plaintiffs without a framework for the amount of relief they can seek.[81]

Even if arbitration providers promulgated new ethical codes, however, petitioners and others alleging foul play would be unable to see the amount of times the arbitrators in their disputes have been accused of unethical conduct.[82] As a result, it is *virtually impossible* for plaintiffs to know what they are up against.[83]

2. Conflicts of Interest

While the AAA Code of Ethics strongly advises against engaging in any conduct that poses a conflict of interest, there is simply nothing stopping arbitrators from doing so.[84] It logically follows that it is impossible to calculate how many times this provision is violated if there is nothing stopping such instances from occurring.[85] The lack of disciplinary measures in the code of ethics combined with the lack of a swearing-in process or oath to abide by the code exacerbates this problem.[86] Additionally, the lack of disciplinary measures fails to weed out arbitrators who may have personal interests in a case.[87] Many arbitrators are also practicing lawyers,[88] meaning they are part of a system that heavily favors arbitration. Since they are practicing attorneys in the field in which the dispute arises, they know the current issues in that field and they may perhaps have an interest in the private and expedient resolution of a particular dispute.[89]

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81 *Id.*

82 *Id.* ("Because mediation and other dispute resolution services . . . are now provided at both individual and organizational provider levels, private professional bodies . . . have promulgated their own ethical codes, sometimes with their own internal grievance procedures, creating new fora for ethical decision-making, but generally without public access to such decisions as these processes are generally confidential.").

83 *Id.*

84 Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 151 (2016) ("[T]he potential effectiveness of discipline as a regulatory mechanism depends in the first instance on the reach of the ethics rules.").

85 *Id.*

86 *Cf.* Shari Maynard, *The Current State of Arbitrator Ethics and Party Recourse Against Grievances*, 8 Y.B. ON ARB. & MEDIATION 204, 208 (2016) ("[The doctrine of arbitral or quasi-judicial immunity] . . . shields arbitrators from personal liability for actions taken for the purpose of fulfilling their functions, even if such acts are unethical and improper").

87 *Id.*

88 *See* Guy Pendell, *The Rise and Rise of the Arbitration Institution*, KLUWER ARB. BLOG (Nov. 30, 2011), http://arbitrationblog.kluwerarbitration.com/2011/11/30/the-rise-and-rise-of-the-arbitration-institution/.

89 Mittenthal, *supra* note 66.

Studies show that information about unfairness in arbitral proceedings is on the rise and that "the more that ordinary members of the American public learn about the meaning and significance of pre-dispute binding arbitration clauses, the more they think the practice is unfair and unjust."[90] In turn, "their ratings of the legitimacy of the procedure decreased."[91] One possible solution is for leaders in the legal community to discuss how to reduce these conflicts of interest.[92] The conversation would turn on how much to invest in developing solutions to this problem.[93]

Additionally, while the preamble of the AAA Code of Ethics proudly declares that "[f]ew cases of unethical behavior by commercial arbitrators have arisen,"[94] one must wonder whether this is simply because most arbitration is binding and not subject to judicial review.[95] Just as "campfire stories do not prove the pervasiveness of ghosts," anecdotal evidence can do little to prove that the arbitral system is plagued with insurmountable ethical violations;[96] however, in the same vein, lack of statistical data cannot be used as a fact to support the theory that there simply is no problem to solve.[97] One problem, therefore, that this Note acknowledges but does not purport to solve is the striking lack of empirical data on ethics proceedings over arbitration.

3. Lack of Legitimacy

The whole arbitral system is negatively affected by the lack of ethical policy.[98] "Legitimacy, in addition to transparency, often evokes notions of good governance and predictability."[99] People have little faith in the arbitral system because, as discussed above and as scholars Bishop and Stevens point out, "applicable ethics rules are difficult to identify, tensions are not readily resolved, and

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90 Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119, 2122 (2017).

91 *Id.* at 2127.

92 *Id.*

93 *Id.*

94 *Code of Ethics*, *supra* note 33, at 1.

95 Maynard, *supra* note 86.

96 Jarred Pinkston, *The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration*, 32 CONN. J. INT'L L. 177, 182 (2017).

97 Maynard, *supra* note 86.

98 R. Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, *in* ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 (2010).

99 *Id.*

experienced practitioners—both among counsel and arbitrators—may have a considerable advantage over newcomers to the field."[100] The fear of unethical arbitral proceedings, ironically, results in more litigation; it also makes people more skeptical of consumer and employment contracts.[101] It stands to reason that if people were more confident that they would be given fair outcomes when they allege misconduct, they would more readily participate in the markets that demand consumer contracts with arbitration provisions.[102]

Repeat player employers also unfairly disadvantage plaintiffs and other petitioners.[103] One empirical study suggests that, counterintuitively, when employers are "repeat players" in arbitration disputes involving abuses, indiscretions, and violations, employees are *less* likely to obtain the outcomes they seek.[104] This supports the claim that there are financial incentives in keeping disputes coming back to the same companies so that they can keep buying the right to their transgressions: everybody benefits but the abused.[105]

Legitimacy will play a vital role in considering how to remedy the problems discussed above.[106] One solution some support is standardizing the arbitration industry so that oversight is easier. There is merit to suggestions like these, but they come with the risk that, in the absence of binding stipulations to continually adhere to ethical procedures, arbitral providers will simply go back to their old habits.[107] Centralizing arbitration and regulating it via the government would not solve the repeat player problem. Additionally, "an administrative agency charged with either task would be very vulnerable to regulatory capture by industries favoring mandatory arbitration."[108] Finally, mandating that each provider organization create an internal impartial review board would not be preventative; the boards would only solve ethical problems after they

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100 *Id.*

101 *Id.*

102 *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RIGHTS & EMP'T POL'Y J. 189, 209 (1997).

103 *Id.*

104 *Id.* (". . . [E]mployees generally win nothing in repeat player cases"); *see also* Silverman, *supra* note 42 ("[I]t makes sense to think that the more one does something, the better he or she becomes at it. This would seem to be especially true where one is able to prevent his adversary from practicing . . . or really from even learning the rules of the game.").

105 *Id.*; *see also* DIRECTV, Inc. v. Imburgia, 136 S. Ct. at 478 (Ginsberg, J., dissenting).

106 Bishop & Stevens, *supra* note 98.

107 Farmer, *supra* note 56, at 2365.

108 *Id.*

arise.[109] Boards like these must work with other solutions, like binding codes of ethics, to truly be effective.

IV. PROPOSAL: NEGOTIATED SOLUTION

Legal practitioners and writers suggest a range of solutions, from standardizing and regulating arbitration so that only one provider is subject to government oversight,[110] to mandating that each provider creates an impartial review board.[111] However, these solutions are risky in that they do not demand a formal arbitral ethical policy change and are subject to cancellation. A better and more lasting solution would be for arbitral organizations like the AAA to enter into negotiations with plaintiffs' lawyers and other advocates. Negotiation has largely the same benefits as arbitration—i.e. that it is inexpensive, confidential, and non-adjudicative—but it is also appealing because both sides enter negotiations voluntarily to reach a mutually agreeable solution.[112] Negotiation permits flexibility in this era of rapidly-changing technology,[113] and it allows the parties to present their stories of the dispute in a less adversarial way than they would through litigation.[114] Negotiation also makes both parties feel as though they are gaining something from the transaction by working through their problems jointly. Litigation or arbitration, however, results in a decision handed down from a decision-maker that could make one or both parties feel slighted.[115]

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109 *See* Quintanilla & Avtgis, *supra* note 90, at 2133–35 ("Most members of the public *first* learn how predispute binding arbitration clauses affect them *after* their disputes arise, and especially after they consult with legal professionals.").

110 *See, e.g.*, Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1120 (2010).

111 Elizabeth C. Woodard, Note, *The UDRP, ADR, and Arbitration: Using Proven Solutions to Address Perceived Problems with the UDRP*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169 (2009).

112 *Dispute Resolution Reference Guide*, DEP'T OF JUST. OF GOV'T OF CAN., https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/04.html (last visited Jan. 30, 2017).

113 *Id.*

114 *See generally* Dario Priolo, *How to Spot an Adversarial Negotiator*, RICHARDSON SALES BLOG, Apr. 1, 2014.

115 *See generally Dispute Resolution Reference Guide*, *supra* note 112.

A. *Negotiation Structure*

The parties to negotiation would be the arbitration provider (in sticking with the examples given throughout this Note, we will use the AAA as an example here) on one side and advocates and plaintiffs' lawyers on the other side. The decision-maker would ideally be someone without any stake in the outcome, who is not particularly tied to the AAA and does not practice regularly as a plaintiffs' attorney in commercial class disputes, arbitration disputes, or any other disputes challenging the legitimacy, validity, or constitutionality of the arbitral system. Perhaps most ideally, the decision-maker would also be someone working in an industry not often affected by the outcomes of arbitral decisions. For example, the leader of major manufacturers, the chairman of the board for Goldman Sachs, or the former CEO of Walmart would not be the best people to settle this negotiation.

The party representing the AAA will ideally be made up of the members of the committee that drafted the most recent AAA code of ethics along with the members of the ABA that assisted in that process. The AAA would be incentivized to come to this negotiation for a number of reasons: first, showing that they are willing to come to the table itself will probably have an impact on the public image of arbitration, and it will make people more inclined to subject themselves to the system. Second, in this negotiation, the opposing parties will assert that they are leveraging their continued business with these providers on the providers' commitment to implementing stricter ethical standards. They may also increase their challenges to arbitration provisions in contracts in different industries, thereby making the cost of defending these suits just as expensive for major corporations, who would stop doing business with arbitrators to re-allocate costs to answering unconscionability complaints. Finally, ideally, the panel of advocates for negotiation would include federal judges who see rising incidents of misconduct in arbitration, who the AAA and other organizations would want to appease so as not to lose favor in the federal courts and thereby cripple the purpose of their system.

The party advocating for the change would be a group of plaintiffs' attorneys that fight misconduct in commercial transactions, class action provisions, employment disputes, and compliance disputes. They would be parties to this negotiation for

reasons of personal commitment to seeing greater integrity in the arbitral framework.[116]

B. *Subject of Negotiation*

The subject of the negotiations would be the problems inherent in the AAA Code of Ethics. These include the lack of qualifications for arbitrators, the absence of an "oath" or some other promise of compliance and devotion to ethical standards and unbiased decision-making, and an the need for an addendum providing disciplinary measures for arbitrators that violate ethical rules.

C. *Primary Goal: Moving Away from Tendency to Favor Repeat Players*

One solution that has been offered to solve the repeat player problem is to move to blind selection of arbitrators. However, standing alone, this solution does not directly address the prejudice that consistent arbitrators have for repeat players; those players will still be the more familiar, the better prepared, and the ones who are in the know in terms of what to argue.

What can be done? For one, arbitrators could be required to explain their decisions. Currently, "in many jurisdictions, an arbitrator need not even explain his or her decisions."[117] This "prevents parties from understanding how the arbitrator arrived at his decision"[118] and generally does away with any accountability.[119] Requiring explanations will hold arbitrators more accountable, give them a basis upon which they can request review of the arbitration,[120] and help in data collection assessing the validity, fairness and consistency of arbitration.[121]

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116 *See* Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998).

117 *See* Quintanilla & Avtgis, *supra* note 90, at 2134.

118 *Id.*

119 Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 809 (2015).

120 *Id.*

121 *See generally* ARBITRATION STUDY, *supra* note 3 (discussing the problems faced in compiling the data presented therein, focusing heavily on the lack of quantifiable information that could be distilled into data points to represent the current framework of the American arbitration system).

Additionally, while arbitrators have a range of principles upon which they rely when deciding a case (i.e. equity), measures like banning case law from arbitral proceedings could take the legal upper-hand out of the dispute. Repeat players see the same issues often and develop an arsenal of case law to easily defeat petitioners. Disallowing case law would solve this inequality. However, some say that making the system fairer for petitioners takes away the entire appeal of the system and eliminates what some suggest is a "primary motivating factor in the embrace of arbitration by some larger institutional repeat players."[122]

D. *Positive Consequences*

The impact of these negotiations would have far-reaching consequences for multiple parties with stakes in the improvement of the arbitral ethical framework.

First and foremost, having greater oversight and stricter regulations for arbitrators is fairer for plaintiffs.[123] When arbitrators cannot keep coming back to corporations with whom they have developed a mutually beneficial relationship, the stakes for the arbitrator are lowered, allowing them to judge a dispute more fairly.[124]

A revamp of arbitral ethics will also increase the legitimacy of the system.[125] Greater confidence in the system means more business for the arbitration providers, and could compensate for the money that arbitrators will lose by no longer getting paid for positive outcomes.[126]

Additionally, less skepticism about the legitimacy of arbitration will lessen the burden on the courts, which is one of the primary goals for the rise in arbitration.[127] It will clear dockets of

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122 Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 301 (2004).

123 David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

124 *Id.*

125 *Cf.* William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435 (2006).

126 *Id.*

127 *See generally* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37–38 (1987):

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of

arbitration disputes and decrease the amount of time judges must spend advising parties and attorneys that arbitral proceedings are hardly ever subject to judicial review.[128] The fact that arbitration is not the same as a judicial proceeding is a major draw for both parties,[129] and it is important to preserve that concept for the long-term growth and survival of the arbitral system.

Finally, new codes of ethics and requirements for national arbitrators working primarily on cases with exclusive federal jurisdiction can serve as models for states and arbitrators working under state statutory requirements, like California, in their setting policies pertaining to arbitration proceedings.[130]

E. *Model Framework for Basis of Negotiation: FINRA*

FINRA's process for selecting arbitrators represents a model that effectively limits the problems discussed in this note. FINRA's arbitration rules—the "Code of Arbitration Procedure"—provide a simplified method for selecting arbitrators and arbitrator panels.[131] When a dispute begins and the statements of claim and responses are filed, both parties are "free to select their arbitrators from a random computer-generated list of proposed FINRA arbitrators."[132] Each party sees a basic general profile, provided by FINRA, about the arbitrator's background ("Disclosure Report"), "including the arbitrator's employment, education,

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> government. . . . Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of them the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

128 *Id.*

129 *See, e.g.*, Lorin Dale-Pierce, *Ethics in Employment Arbitration: An Analysis of the Feasibility of a Code of Ethics for Employment Arbitrators*, 26 GEO. J. LEGAL ETHICS 613, 614 (2013).

130 *See* Folberg, *supra* note 51.

131 *Arbitration Rules*, FINRA, https://www.finra.org/arbitration-and-mediation/arbitration-rules (last visited Jan. 30, 2018).

132 Kirill Kan, *The Importance of FINRA's Arbitrator Selection Process and Clarity in the "Evident Partiality" Standard in the Wake of Morgan Keegan*, 18 FORDHAM J. CORP. & FIN. L. 167, 173–74 (2012).

and training, as well as a list of cases in which each of the arbitrators has issued a final decision."[133] Similar to jury selection, parties can review, strike the arbitrators they do not want on the list, and rank those remaining.[134] Comparing those two lists, FINRA appoints the panel.[135]

This blind selection process removes the anxiety arbitrators may feel about wanting companies to like them; it ensures that they remain in the job rotation no matter their decisions.[136] Blind selection also limits the ability of parties to, for example:

> exclude entire classes of arbitrators on the basis of bias or other preferences [. . .]. While parties are generally stuck with the assigned judge in the public adjudication system, parties in arbitration may screen out potential arbitrators on any grounds, including factors that would be inappropriate in public adjudication, such as race or gender."[137]

Implementing this process in all of the contracts the AAA holds with the corporations to whom it provides arbitral services will allow plaintiffs to feel at ease that the decision-maker in their case is not someone whose compliance has been bought.[138] It does not solve the problem of the lack of disciplinary measures, but with fewer conflicts of interest, that concern becomes less pressing.

FINRA also allows either party to remove an arbitrator from a case. It offers "requests for recusal" and "requests for removal."[139] While the standards for prevailing on either of these requests differ, the ever-present possibility that an arbitrator may be called to be removed is itself an enforcement mechanism. Not only does the arbitrator lose the income from presiding over that case, he or she may also lose the business of future cases due to his or her inability to remain independent and impartial (as too many

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133 *Id.*

134 Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 60 (2014) ("The parties to a FINRA arbitration participate in the selection of the arbitrators, just as litigants do in the selection of juries, but not judges. The party selection system raises the additional question, not presented by the judicial decision-making literature, of whether party selection can mitigate or eliminate the effects of characteristics that might bias the decision-maker.").

135 *Id.*

136 Reuben, *supra* note 122, at 299–300.

137 *Id.*

138 *Id.*

139 Seth E. Lipner & Brady Sparks, *Ex-employees of Respondents Should Not Serve as Arbitrators*, 17 PIABA B.J. 337, 343 (2010).

of these violations can lead to suspension or being taken out of the employment rotation).[140]

Arbitration clauses typically exist in a contracts realm in which unequal bargaining power, without more, does not automatically show unfairness to plaintiffs and does not warrant a nullification of the agreement.[141] But there are still components of the FINRA arbitrator selection process that seem facially unfair to plaintiffs. Opponents of the process point out that, because of the blind auction, "there is no real opportunity to find out much more about the proposed arbitrator's orientation and objectivity."[142] Additionally, in all disputes under $100,000, FINRA uses a "non-public arbitrator," or industry arbitrator—one who is affiliated with a financial services company or who has at some point worked for the securities industry—to resolve the dispute.[143] For disputes greater than $100,000, the case will be presided over by a panel of three arbitrators, one of whom will be an employee in the securities industry.[144] While the blind auction serves some of the needs of both of the parties (despite some of its negative or indirect consequences), this use of the industry arbitrator seems to advantage corporations more than plaintiffs.[145] For this reason, even the FINRA model stands to make more ethical changes.

V. Lingering Problems

All of the proposals above would greatly remedy or mitigate the problems faced by plaintiffs in arbitration disputes. However, some problems would remain.

The most obvious of these, and the only one discussed in this section, is the compulsory class action waiver that so often accompanies compulsory arbitration provisions. When the Supreme Court in *Concepcion* allowed these waivers, it reasoned that "class-

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140 *Id.*

141 *Cf.* Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 Yale J. on Reg. 313, 348 (2011) (indicating that contracts of adhesion show such a gross display of unequal bargaining power that they *may* yield further inquiry into the conscionability of the contract, but do not always do so).

142 Seth E. Lipner, *Who Are These "Arbitrators" Anyway?*, Forbes (Aug. 24, 2009, 2:00 PM), https://www.forbes.com/2009/08/24/commentary-arbitration-lipner-intelligent-investing-finra.html#76ed8991033f.

143 *Id.*

144 *Id.*

145 *Id.*

wide arbitration sacrifices 'the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'"[146] Several scholars, plaintiffs' attorneys, and legal experts lambasted that decision for its "negative impact on public access to justice."[147] Some observe that the effect of *Concepcion* and its progeny will ultimately be that companies, feeling confident in the constitutionality of their class action waivers, will include these waivers at every turn. After all, "under the FAA, an arbitration clause need not even be signed to be valid, so long as it is written."[148] Thus, some scholars argue, "given that most companies would prefer not to be sued in class actions, we may soon see the possibility of class actions only in rare contexts in which the company and potential plaintiffs do not have a prior relationship."[149] Another scholar observes that in a study the year following the decision in *Concepcion*, "the Searle Civil Justice Institute . . . found that 36.5 percent of arbitration clauses examined included a class action waiver,"[150] compared to 30.8 percent prior to *Concepcion*. There is no reason to believe that these numbers will not continue to increase as arbitration becomes more isolated from judicial oversight and review. Certainly, the decision in *Epic Systems* (discussed above) will shed some light on the direction in which we are headed.

On the other hand, some observers welcomed the *Concepcion* decision and expansion of the class action waiver. "The unfortunate reality," writes Lawrence W. Schonbrun, executive director of Class Action Watch, a nonprofit dedicated to alerting the media about class action abuse,[151] is

> far from the plaintiffs' lawyers' in the happy-talk notions of consumers joining together to fight for their rights. A plaintiff's class action lawyer finds one customer willing to lend their name to a class action lawsuit and then negotiates a multi-million dollar settlement in the name of thousands or even millions of un-

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146 Barr, *supra* note 119, at 812 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

147 *Id.* at 813.

148 Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012).

149 *Id.*

150 Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility v. Concepcion, 45 LOY. L.A. L. REV. 435, 465 (2012).

151 *Lawrence W. Schonbrun*, HUFFPOST, https://www.huffingtonpost.com/author/lawrence-w-schonbrun (last visited Nov. 20, 2017).

> witting consumers wherein, like the Ford Explorer class action, the lawyers get millions (or tens of millions) while the consumers get coupons.[152]

Opinions like Schonbrun's may not be meritless. He is certainly not the first scholar to note that "entrepreneurial plaintiffs' attorneys" take advantage of small claims to make huge profits in the name of, for example, consumer protection.[153] But it is worth wondering what the alternative—banning class action suits because attorneys cannot be trusted—would bring in terms of consequences. In response to rallying cries for reform like those made by Schonbrun, some scholars lament the cynicism inherent in such a view of the goal of plaintiffs' attorneys. These scholars ask, "is the Court's enforcement of a class action waiver, which effectively strips consumers of an aggregate remedy, really a good solution to these problems?"[154] The answer, given consideration of federal courts' apparent disinterest in adjudicating these claims and enthusiasm for handing them off to the land of no review, is resounding: "certainly not."[155]

VI. Conclusion

Arbitration is valuable in the American legal system for many reasons. It is expedient, inexpensive, and confidential. However, with the massive influx in arbitral proceedings in the last decade, it has become more and more similar to a money-making scheme and less like a proper alternative to the administration of justice. With an updated and proper ethics code, we can ensure that repeat parties such as corporations do not buy their rights to engage in misconduct (i.e. getting unfair treatment and incentivizing arbitrators to become impartial); that petitioners get the relief they seek; and that peoples' confidence in the arbitral process will be increased so that the business succeeds and alternate methods of dispute resolution will grow. This evolution will come from working together in negotiation between the two sides of the dispute: those who pro-

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152 Lawrence W. Schonbrun, *Supreme Court Ruling is Not Bad News for Consumers, the Class Action System is the Real Culprit*, HuffPost (May 19, 2011, 2:43 PM), https://www.huffpost.com/entry/supreme-court-ruling-is-n_b_862491.

153 *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987).

154 Frank Blechschmidt, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. Pa. L. Rev. 541, 569 (2012).

155 *Id.*

vide arbitral services and those who allege that the methods for doing so are currently unfair. FINRA provides a solid framework for selecting arbitrators so that the problem of repeat players is decreased, but there are still major components like this missing from most of the country's arbitration providers—including, namely, a lack of disciplinary measures and an inability to oversee the prevalence and consequences of conflicts of interest. As arbitration grows, if its ethics provisions do not change to meet the needs of all of the parties involved, it stands to reason that arbitration would not be able to be considered just at all.